SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 168

CHICAGO & EASTERN ILLINOIS RAILROAD CO., AN INDIANA CORPORATION, ET AL.,
Petitioners,

vs.

PAUL J. KERN AND IRVING M. LESCH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1203.

CHICAGO & EASTERN ILLINOIS RAILROAD CO., AN INDIANA CORPORATION, ET AL.,

Petitioners,

vs.

PAUL J. KERN AND IRVING M. LESCH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Respondents contend that no federal question is presented by this record. We adhere to this contention despite the fact that the pleadings filed by petitioners purport to raise questions under Section 77(f) of the Bankruptcy Act and under the full faith and credit clause of the United States Constitution.

QUESTIONS PRESENTED.

We take complete issue with the statements made by counsel for petitioners in attempting to state the questions presented. It is most respectfully urged that the questions presented by this record actually are as follows:

1. Do the articles of incorporation of petitioner Railroad authorize the Railroad to elect its thirteen directors for staggered terms without the consent of at least two-thirds of the outstanding Class A stock?

2. The statutes of Indiana merely permit but do not require staggered terms for directors of Indiana corporations. Does the decree of the Illinois Court, which construes the Railroad articles of incorporation as prohibiting staggered directors (without consent of two-thirds of the Class A stock), deny full faith and credit to these Indiana statutes?

STATEMENT OF THE CASE.

The statement submitted at page 3 of the petition goes far beyond the actual issues in this case. In fact, the only real issue here is the meaning of the articles of incorporation of the Railroad. The articles of incorporation provide:

1. All shareholders shall have the right of cumulative voting for directors (Article IV of Certificate of Incorporation at A. 143).

2. The company shall have thirteen directors with the first board to serve until May 15, 1941, for a period not exceeding one year (Article VII at A. 145, 146). Also there is another most important provision:

3. The provisions of the articles of incorporation which have reference to or which are protective of the rights and interests of the Class A shareholders cannot be amended, altered or repealed except with the consent of the holders of at least 2/3 of the Class A stock given at a meeting called for that purpose, at which the holders of the Class A stock vote separately as a class (Article IV at A. 143).

The Railroad was incorporated on June 27, 1940, in the State of Indiana. Respondent, Kern, owns 4,000 shares

of Class A stock and respondent, Lesch, owns 1,000 shares of such stock. The petitioner Railroad had uniform terms of directors until July 10, 1953, when it purported to amend its by-laws so as to provide for election of directors on staggered terms. This was done without consent of the Class A shareholders.

These proceedings were instituted in the Superior Court of Cook County on November 12, 1958. Respondents, acting as plaintiffs, sought to enjoin petitioner Railroad from electing its directors upon a staggered basis without consent of the Class A shareholders. Such relief was granted by the courts of Illinois.

The above is a sufficient statement of the case for purposes of this proceeding. The only issue in the case actually is the matter of interpretation of the articles of incorporation. All of the contentions made by petitioner as to the existence of a federal question which require decision by this court are predicated upon collateral matters which may be briefly stated as follows:

1. The plan of reorganization of petitioner Railroad was approved by the Interstate Commerce Commission and then by the United States District Court in Chicago. The plan provided that the reorganized Railroad was to have a board of directors of thirteen members with term of office of one year each. (Paragraph X of reorganization plan at App. A, page 48). However, the provisions of the plan of reorganization are not directly involved in this case in any manner. The Appellate Court for the First District of Illinois gave weight to the provisions of the plan of reorganization only because the court, "felt that the plan had a strong bearing on the proper construction and interpretation of the articles of incorporation and the by-laws". The Appellate Court expressly stated that, "the basic

document on which plaintiffs' rights must be determined, is the certificate of incorporation". (App. A at Page 11a).

2. Petitioners attempt to raise a federal question upon the full faith and credit clause of the United States Constitution. Therefore they cite and argue at great length the statutes of Indiana which permit Indiana corporations to elect directors on staggered terms (App. H at Page 51 A). However, the clear, immediate and obvious answer is that this statute of Indiana is not mandatory, but is merely permissive. Since the statute was not mandatory, there was no reason for the Appellate Court for the First District of Illinois to consider the results of its application. The statute is simply not applicable. The Appellate Court of Illinois carefully pointed this out in its second opinion (App. D at Page 29 A).

We therefore repeat that the sole and only question involved in this case is purely and simply a matter of construction of the articles of incorporation of petitioner Railroad. No other question of any kind was presented or decided and no other question actually exists in the case.

ARGUMENT.

The arguments depended upon by respondents in urging denial of the petition are therefore simple. We will summarize our arguments as follows:

The sole and central issue presented by this record is the matter of construction of the articles of incorporation. The only question is: Do the articles of incorporation of petitioner Railroad authorize it to institute staggered terms for election of its directors without consent of the Class A shareholders? The plan of reorganization is important only if it can serve as a guide to assist in obtaining the proper interpretation of the articles of incorporation.

This entire argument of petitioners is based upon the completely false assumption that the Appellate Court of Illinois used the plan of reorganization, "to fix a rule of law" (petition page 18). This assumption is totally unsupported by the record. Entirely to the contrary, the Appellate Court was most careful to point out that the plan of reorganization was of collateral importance only. The Appellate Court specifically held that (petition page 8),

> "We do not hold that the reorganization plan and agreement is now binding on defendant corporation. The basic document on which plaintiffs' rights must be determined is the certificate of incorporation."

Thus, this record contradicts the petition for certiorari and demonstrates that the plan of reorganization itself is not involved in this case. Therefore, no federal question involving the Bankruptcy Act of the United States is presented by this record. If the plan of reorganization

had never existed and if there had never been any bankruptcy proceedings, the same result would have been reached in decision of this case.

The statutes of Indiana merely give every Indiana corporation the right to provide for staggered terms of directors in their articles of incorporation. No statute gives any Indiana corporation the right to institute staggered terms for directors in contravention of its articles of incorporation and by by-laws. That is, the statutes of Indiana are not mandatory and do not require any corporation to institute staggered terms for its directors. These statutes are permissive only and they are intended to apply only when their application is not contrary to the articles of incorporation. Since the articles of incorporation expressly prevented this type of amendment to the corporate by-laws without consent of Class A shareholders, there was neither the need nor the opportunity to apply the permissive Indiana statute. It follows that the courts of Illinois have not denied full faith and credit to the Indiana statute. The statutes of Indiana merely have no bearing upon the problem presented by this record.

The above is all that is required to demonstrate that there is no federal question presented by this record. Arguments such as the merits of cumulative voting have no bearing upon the issues here. The Appellate Court of Illinois never applied any principles of Illinois constitutional law to this case. The Court patently cited *Wolfson* v. *Avery*, 6 Ill. 2d 78 only for the obvious general proposition that classified directorships and staggered elections diminish the effective voting power of minority shareholders.

The sole and only question is the right of petitioner Railroad to institute a system of staggered terms for its directors without consent of its Class A shareholders under the applicable provisions of its existing articles of in-

corporation and by-laws. It is submitted that this question has been properly decided by the courts of Illinois under applicable State law. No federal question is visible here.

CONCLUSION.

For the foregoing reasons it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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